United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1127

~~74-8027~~

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ROBERT MATHERSON and CAROLYN MATHERSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

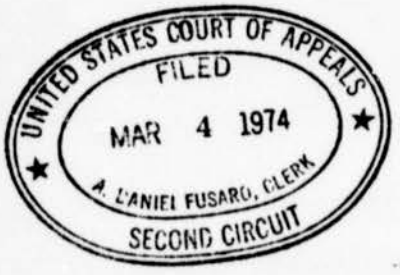

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TABLE OF CONTENTS

TABLE OF CASES

OTHER CITES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74 - 8027

UNITED STATES OF AMERICA,

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-against-

ROBERT MATHERSON and CAROLYN MATHERSON,

Defendants-Appellants.

BRIEF FOR APPELLANTS ROBERT AND CAROLYN MATHERSON

Preliminary Statement

The Appellants, ROBERT and CAROLYN MATHERSON, appeal from a Judgment of Conviction in the United States District Court for the Eastern District of New York, entered on January 4th, 1974, adjudging them guilty of violating Title 36, C.F.R., Section 7.20 sub-section 2 and sub-section 3

(Title 16, United States Code, Section 3). Said judgment was entered after a non-jury trial based upon a stipulated statement of facts. As a result of this conviction, the Appellant, ROBERT MATHERSON, was fined in the amount of $1,250 and placed on probation for a period of one year and the Appellant, CAROLYN MATHERSON, was fined in the amount of $300 and also placed on probation for a period of one year.

STATEMENT OF THE FACTS

The Appellants, ROBERT and CAROLYN MATHERSON, submitted a statement of facts surrounding the charges herein. Those facts are substantially as follows:

ROBERT and CAROLYN MATHERSON, husband and wife, are residents of 90 West Lighthouse Walk, Kismet, Fire Island. ROBERT MATHERSON owns and supervises four restaurants located off of Fire Island and such supervision necessitates him leaving his home at irregular hours and traversing part of the Fire Island National Seashore by automobile. While travelling on the Seashore during these hours, the Appellants were cited with violations of Title 36, C.F.R., Section 7.20, sub-section 2 and sub-section 3 on August 18th, 1972 and from June 8th, 1973 through July 22nd, 1973, the dates being inclusive.

The above mentioned regulations mandated that all vehicles travelling across Seashore lands must have two permits; one from the Town of Islip, the other from the National Seashore. The Islip permit must be secured first and then application is made to the National Seashore for the additional permit.

Although both the Federal Islip regulations provide for the granting of special permits to those who are aged or infirm, Appellants contend that others neither old nor infirm have been granted special permits permitting them to drive their vehicles at any time within the areas prohibited by the regulations in issue. These special permits apparently are granted to a resident of Fire Island on a good faith showing of need or hardship by the applicant. Neither Islip nor the Federal regulations publishes standards or guidelines to applicants for these special permits.

Accordingly, on June 27th, 1973, ROBERT MATHERSON applied to the Town of Islip for a special permit. MATHERSON applied both in writing and by personal appearance for such a permit, stating his aforementioned hardship. His application was denied without explanation and eventually MATHERSON

received a regular permit. Thereafter, the Appellants were cited for violations.

STATUTES INVOLVED

Title 36, C.F.R., Section 7.20, sub-section 2 states in part as follows:

> "(i) The Superintendent is authorized to establish a system of permits consistent with the requirements of these regulations. Any person, firm, corporation, or partnership may apply to the Superintendent for a permit using a form to be provided for that purpose.
>
> (v) Special permits may be issued to those persons who have satisfied the Superintendent that, by reason of their advanced age or infirmity, they require the use of a motor vehicle.
>
> (vii) No permit will be issued by the Superintendent for any motor vehicle until the applicant has first secured from the towns of Brookhaven and/or Islip (and if required from the Village of Ocean Beach or Saltaire also) an appropriate permit covering the same activity, vehicular use, and area of use for which a seashore permit is requested."

Title 36, C.F.R., Section 7.20, sub-section 3 states in part as follows:

> "(i) Except as otherwise specifically provided in this section, travel on all

seashore land by motor vehicles is permitted as follows:

> (a) From May 15 through September 14, inclusive, daily from 6 p.m. of 1 day through 9 a.m. of the following day but not from 9 a.m. Saturday through 6 p.m. Sunday."

The Fire Island Beach Buggy Ordinance, Section 701(e) states in part as follows:

> "(e) Special permits may be issued to those persons who have satisfied the Board that by reason of their advanced age or infirmity, they require the use of a motor vehicle."

QUESTIONS PRESENTED

1. Whether Section 7.20 of the Code of Federal Regulations involves an improper delegation of Federal authority to a locality which renders the section unconstitutional?

2. Whether the absence of specific standards governing the issuance of special permits renders the Fire Island Beach Buggy Ordinance vague and unconstitutional?

POINT I

SECTION 7.20(2)(vii) OF THE CODE OF FEDERAL REGULATIONS INVOLVES AN IMPROPER DELEGATION OF FEDERAL AUTHORITY TO A LOCALITY WHICH RENDERS THE SECTION UNCONSTITUTIONAL.

The District Court accurately stated that Congress has

plenary power to promulgate regulations concerning the use of all Federal territory. UNITED STATES CONSTITUTION, ARTICLE IV, SECTION III, CLAUSE 2.

> "This power is without limitation and preempts that of the Executive or of the several states unless Congress specifically authorizes the administration of public land by one or both of these governmental units." (A 25)*

In 1964, Congress, by statute, authorized the Secretary of the Interior to establish Fire Island National Seashore. TITLE 16, UNITED STATES CODE, SECTION 459e(a). Its aim in making this authorization was to preserve and protect certain unspoiled and undeveloped beaches on Fire Island. In order to assure that the desired conservation be accomplished, the Secretary appointed a Superintendent to administer the National Seashore. This he was unquestionably entitled to do. UNITED STATES v. BORENO, 50 F.Supp. 520 (D.C., MD., 1943). Acting in a manner in which he obviously thought was consistent with the specific administrative delegation, the Superintendent issued various rules and regulations and in

*The letter "A" refers to the Appellants' Appendix.

particular, Title 36, C.F.R., Section 7.20(2)(vii). It is this specific provision that the Appellants believe involves an improper delegation of Federal authority to a local municipality and is, therefore, unconstitutional.

A prerequisite to any valid delegation of power by various agency heads is that they "still remain...responsible for the acts of their subordinates". UNITED STATES v. BORENO, (SUPRA) at p.528. Under the aforementioned section of the C.F.R., no official of the Department of the Interior maintains responsibility for the actions of the Beach Buggy Commission.

A reading of the contested regulation reveals that before a National Seashore permit can issue, one must first secure a vehicular permit from the Town of Islip. Whatever the determination the Commission makes, be it approval or denial, it is final and not subject to review by the Superintendent of the Seashore. Thus, it becomes apparent that, should the Town of Islip refuse to issue either a special or regular permit, an individual is prohibited from travelling on Federal territory. Because the Seashore perfunctorily grants permits to those who have complied with the Islip

regulations, the Commission, in effect, completely dictates as to who will be permitted to travel on the National Seashore. It is, therefore, clear that the lack of accountability of the Commission to the Superintendent results in an improper delegation of Federal authority. Additionally, the Appellants believe that because of the real and potential harm that could accrue to private interests, and because of the absence of any demonstrated need for enhanced administrative efficiency, this delegation of authority to the Town of Islip is excessive, as a Federal agency has totally abdicated all supervisory responsibility.

In its opinion, the District Court claimed that,

> "The courts have upheld similar grants of administrative power to the states in order to expedite federal, state cooperation." (A 29)

In support of its conclusion, the Court cited GAULEY MOUNTAIN COAL CO. v. DIRECTOR OF U.S.B. MINES, 224 F.2d 887 (4th Cir, 1955) and CLARK DISTILLING CO. v. WESTERN MARYLAND R.R. CO., 242 U.S. 311 (1917). The Appellants respectfully submit that upon a close reading of the above cases, and cases cited therein, it becomes clear that Title 36, C.F.R., Section 7.20 (2)(vii) is unconstitutional as it differs markedly from

those statutes held to involve valid delegations of authority.

In GAULEY MOUNTAIN (SUPRA), the Court upheld a Federal statute which required compliance with a State classification as pre-condition to a Federal regulation. The Court ruled that,

> "There is no delegation by Congress of its own power to a state agency, but merely the acceptance by Congress of state action as the condition upon which its exercise of power is to become effective." 224 F.2d 887 at p.890.

Nevertheless, it would appear that, in adopting the GAULEY philosophy as his own, the District Judge in the instant case failed to examine either the language or the history of the statutes involved. The issue in GAULEY was the constitutionality of Section 209(d)9 of the Act of July 16th, 1952, 66 Stat. 702, 30 U.S.C.A. 478, which required that certain precautions be observed before electrically driven equipment could be used in a "gassy" mine. Section 209(b) classified a "gassy" mine as any mine found to be

> "A gassy or gaseous mine pursuant to and in accordance with the law of the state in which it is located."

It is essential to note that Congress, by specific language, expressed its belief in the need for Federal-State cooperation.

And so it follows in every other constitutional delegation: Whenever Congress intends to involve the assistance of State officials, it either expressly says so in the statute or it clearly manifests its intention in the legislative history of the act. An examination of Title 16, United States Code, Section 459(e), the formative statute in the instant case, reveals no evidence that Congress intended to involve the locality in any manner.

In CLARK DISTRILLING CO. (SUPRA), another case cited by the District Court, the Supreme Court upheld the constitutionality of the Webb-Kenyon Act, 27 U.S.C.A., Section 122, against the contention that it involved the improper delegation by Congress of legislative power. However, in upholding the Act, the Court was very careful in tracing the statutory history involved. It concluded,

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford

a means by subterfuge and indirection to set such laws at naught." 242 U.S. 311 at p.324.

Thus, while the Webb-Kenyon Act permitted state prohibitions to apply to movements of liquor from one State to another, it was clearly the intent of Congress for this to be so.

Several other decisions have upheld the delegation of legislative authority by Congress, but in all cases there was the prerequisite that Congress either specifically called for State involvement or clearly intended such action. See UNITED STATES v. BEKINS, 304 U.S. 27, 48, 58 S.Ct. 811 (1938); HUMBLE OIL & REFINING CO. v. UNITED STATES, 198 F.2d 753 (10th Cir., 1952), cert. den'd. 344 U.S. 909, 73 S.Ct. 328. Because this prerequisite is missing in the instant case, and because the Beach Buggy Commission is not accountable to the Superintendent, the delegation of power herein contested should be found unconstitutional.

POINT II

THE ABSENCE OF SPECIFIC STANDARDS GOVERNING THE ISSUANCE OF SPECIAL PERMITS RENDERS THE BEACH BUGGY ORDINANCE VAGUE AND UNCONSTITUTIONAL.

The Beach Buggy Ordinance of the Town of Islip contains no standards which would govern the issuance of the special

permits, and as a result, permits were granted in an indiscriminate and arbitrary manner. On June 7th, 1973, the Beach Buggy Commission granted Walter Neilson permission to travel on the beach on working days,

> ".....as his hours of employment do not coincide with the hours of permitted travel on Fire Island." (A 50)

Yet the same Commission, acting pursuant to the same ordinance, denied ROBERT MATHERSON's application for a special permit. The Appellants believe that the unequal enforcement of the ordinance has succeeded in rendering it unreasonable and invalid.

An ordinance to be valid must be reasonable not only in its purpose but also in its enforcement. WEINER v. VALENTINE, 17 N.Y.S.2d 355 (1940); BALLARD v. ROTH, 253 N.Y.S. 6, 141 Misc. 319 (1931). In deciding whether an ordinance has been reasonably enforced, the Court should inquire as to whether the ordinance has been enforced equally among persons affected. The Court, in LENGEL v. PIRNIE, 128 N.Y.S.2d 490 (1954), wrote that an ordinance

> "...must be operated with substantial equality on all persons and classes similarly situated." 128 N.Y.S.2d 490 at p.491.

Clearly, the facts in the instant case are such that persons similarly situated were treated differently.

There remains the question as to whether the instant appeal is the proper setting for an attack upon the constitutionality of the municipal ordinance. The District Court ruled that the ordinance was

> "....not ripe for review in the context of the instant federal criminal proceeding."

The Appellants respectfully submit that this analysis was error.

Assuming arguendo that this Court should fine that a valid delegation of power exists, the Federal Government (here the Superintendent of the National Seashore) must assume the responsibility for the decision of the Beach Buggy Commission. UNITED STATES v. BORENO (SUPRA). It is implicit in this that, in addition to accepting the Commission's decision, the Superintendent is accepting the ordinance pursuant to which the Commission acted. If this were not so, the anomalous situation would develop whereby the rule of men would receive pre-eminence to that of the rule of law. To do this, would be to turn somersaults with the history of this democracy.

In conclusion, should a valid delegation of power be found to exist in the instant appeal, the Appellants maintain that this Court is the proper forum to challenge the constitutionality of the Beach Buggy Ordinance. The Appellants further believe that absence of standards in the ordinance permits its unreasonable enforcement and is, therefore, unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Title 36, C.F.R., Section 7.20 and the Fire Island Beach Buggy Ordinance, Section 701(e) should be declared unconstitutional and the charges dismissed, or in the alternative, the Judgments of Conviction reversed.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendants-Appellants

Service of three (3) copies of the within
is hereby admitted
this day of
PAUL J. CURRAN
.....
Attorney(s) for